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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

DARRIN L. SHORT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioner denied his right to constitutional and military due process in a case where the only evidence of guilt was the result of a scientific test and where he was forced to rely upon the prosecution's sole expert witness for assistance, when that expert did not constitute "competent" expert assistance as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985), and 10 U.S.C. § 846 (1994) due to his clear conflict of interest and resulting lack of independence?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Petition	5
Conclusion	18
Appendix A	1a
Appendix B	24a

TABLE OF AUTHORITIES

Cases:

United States Supreme Court

Ake v. Oklahoma, 470 U.S. 68 (1985)..... *passim*
Britt v. North Carolina, 404 U.S. 226 (1971)..... 7
Clinton v. Goldsmith, 119 U.S. 1538 (1999)..... 14
Medina v. California, 505 U.S. 437 (1992)..... 5
United States v. Scheffer, 523 U.S. 303 (1998) 9
United States ex rel Smith v. Baldi, 344 U.S. 561 (1953) 11

Circuit Courts

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) 10
Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990)..... 11
Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987)..... 6
Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970)..... 11
Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) 10
United States v. Bass, 477 F.2d 723 (9th Cir. 1973) 11
United States v. Chavis, 486 F.2d 1290 (D.C. Cir. 1973)..... 11
United States v. Crews, 781 F.2d 826 (10th Cir. 1986) 10
United States v. Sloan, 776 F.2d 926 (10th Cir. 1985)..... 10

Military Courts

United States v. Burnette, 29 M.J. 473 (C.M.A. 1990) ... *passim*
United States v. Campbell, 50 M.J. 154 (1999) 8, 9
United States v. Garries, 22 M.J. 288 (C.M.A. 1986)..... *passim*
United States v. Manuel, 43 M.J. 282 (1995) 7
United States v. Murphy, 23 M.J. 310 (C.M.A. 1987)..... *passim*
United States v. Sebring, 44 M.J. 805 (N.M. Ct. Crim. App. 1996) 16
United States v. Short, 50 M.J. 370 (1999) ..... *passim*
United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988) .. *passim*

State Supreme Courts

Dubose v. State, 662 So.2d 1189 (Ala. 1995) 6
Polk v. State, 612 So.2d 381 (Miss. 1992) 6
State .v. Coker, 412 N.W.2d 589 (Iowa 1987) 6
State v. Bridges, 385 S.E.2d 337 (N.C. 1989) 6
State v. Moore, 364 S.E. 648 (N.C. 1988) 6
Thornton v. State, 339 S.E.2d 240 (Ga. 1986) 6

Constitution:

U.S. CONST. AMEND. V 2

Statutes and Rules:

Article 36, U.C.M.J., 10 U.S.C. § 836 ..... 2, 17
Article 46, U.C.M.J., 10 U.S.C. § 846 ..... *passim*
Article 67, U.C.M.J., 10 U.S.C. § 867 14
Article 112a, U.C.M.J., 10 U.S.C. § 912a 3, 5
18 U.S.C. § 3006A(e) ..... *passim*
28 U.S.C. § 1259(3) 2

Rule for Courts-Martial 504 7
Rule for Courts-Martial 703(d) ..... *passim*
Rule for Courts-Martial 918(c) 8

Miscellaneous:

S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 (2d ed. 1992) 14
4 C.J.S. Appeal and Error § 185 (1993) 14
Manual For Courts-Martial, United States (1998 ed.) 5, 15

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PETITION FOR A WRIT OF CERTIORARI

Aviation Structural Mechanic (Hydraulics) Second Class Darrin L. Short, U.S. Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 50 M.J. 370 (1999), is located at Appendix A (1a-23a). The unreported opinion of the Navy-Marine Corps Court of Criminal Appeals, No. 95 1617 (N.M. Ct. Crim. App. November 10, 1997) (unpub. op.), is located at Appendix B (24a-28a).

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on May 26, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Article 36, Uniform Code of Military Justice, 10 U.S.C. §836, provides in part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Article 46, Uniform Code of Military Justice, 10 U.S.C. §846, provides in part:

> "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

STATEMENT

On March 23, 1995, Petitioner's commanding officer ordered him to provide a urine sample, which was sent to the Naval Drug Screening Lab in Jacksonville, Florida for testing. (R. at 171-72.) The sample ultimately tested positive for tetrahydrocannanibol [THC], a purported metabolite produced by the ingestion of marijuana. (R. at 243.) Petitioner subsequently was charged with unlawful use of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a, based solely on the urinalysis test result.

At his court-martial, Petitioner filed a timely motion requesting independent expert assistance. (R. at 20; Appellate Exhibit-IV.) Citing her insufficient background in the area of scientific urinalysis testing procedures, as well as, the complexity of the scientific information involved in the case, defense counsel requested an independent expert to assist her in understanding the scientific evidence, identifying deficiencies with that evidence, and preparing effective cross-examination of the prosecution's expert witness. (R. at 21; Appellate Exhibit-IV.) After conceding that the defense was entitled to expert assistance, the government opposed the motion, claiming that the prosecution's urinalysis expert from the Jacksonville drug lab, Mr. Cary Hall, would serve as an "adequate substitute" for the independent expert

requested by Petitioner. (R. at 22-23.) Defense counsel contested this claim. She asserted that the absence of confidentiality in any consultations she would have with Mr. Hall, as well as his obvious affiliation with both the prosecution and the lab that tested Petitioner's sample, rendered any assistance he could offer the defense inadequate. (Appellate Exhibit-IV.) Since the Jacksonville lab had a policy prohibiting its employees from testifying against each other at courts-martial, defense counsel indicated that an expert from one of the other military drug-testing laboratories would be sufficient. *Id.* The military judge denied Petitioner's motion. (R. at 25.) The military judge found that Mr. Hall, who ultimately testified against Petitioner, was a neutral witness who represented neither side and, therefore, could provide the defense with adequate assistance. *Id.* He further advised defense counsel to consult with other military defense attorneys in order to acquire the desired technical knowledge. *Id.*

Prior to his trial, Petitioner filed an extraordinary writ appealing the military judge's ruling with the Navy-Marine Corps Court of Criminal Appeals. (Appellate Exhibit-XIX.) The writ was denied. After Petitioner was convicted of wrongfully using marijuana based on the urinalysis test result alone, the Navy-Marine Corps Court of Criminal Appeals ultimately affirmed the conviction and sentence. *United States v. Short*, No. 95 1617 (N.M. Ct. Crim. App. November 10, 1997).

The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' decision on May 26, 1999, and upheld the military judge's ruling. *United States v. Short*, 50 M.J. 370 (1999). The Court of Appeals for the Armed Forces held that the military judge did not abuse his discretion in denying the motion because the defense counsel did not show the requisite "necessity" for the independent expert.

REASON FOR GRANTING THE PETITION

Petitioner was denied his right to constitutional and military due process in a case where the only evidence of guilt was the result of a scientific test and where he was forced to rely upon the prosecution's sole expert witness for assistance because that expert did not constitute "competent" expert assistance as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985), and 10 U.S.C. § 846 (1994) due to his clear conflict of interest and resulting lack of independence.

A. The right to expert assistance in the military.

A military servicemember's right to expert assistance at court-martial has three sources: 1) the Due Process Clause of the Constitution, as interpreted in *Ake v. Oklahoma,* 470 U.S. 68 (1985), 2) Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846 [hereinafter U.C.M.J.], and 3) Rule for Courts-Martial [hereinafter R.C.M.] 703(d), Manual for Courts-Martial [hereinafter MCM], United States (1998 ed.). In *Ake v. Oklahoma* this Court held that when an indigent defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial, the government must assure the defendant access to an independent, competent psychiatrist who will assist in the evaluation, preparation, and presentation of the defense. *Ake*, 470 U.S. at 83.[1]

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[1] *Ake* represented an expansion of earlier due process cases holding that an indigent defendant is entitled to the minimum assistance necessary to assure him "a fair opportunity to present his defense" and "to participate meaningfully in the judicial process." *Medina v. California*,

Consistent with *Ake*, the Court of Appeals for the Armed Forces has ruled more broadly that, "[a]s a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).[2] This does not mean, however, that an accused is entitled to an expert of his own choosing. *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990). "All that is required is that **competent** assistance be made available." *Id.* (citing *Ake*, 470 U.S. at 83) (emphasis added). A demonstrated willingness to provide competent assistance at government expense satisfies the government's burden. *Id.* at 476.

In addition to this due process right, Congress requires that the prosecution and the defense counsel must have "equal opportunity to obtain witnesses" in accordance with the regulations prescribed by the President. Article

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505 U.S. 437, 444 (1992) (quoting *Ake*, 470 U.S. at 76).

[2] This holding parallels the broader Congressional mandate in the Criminal Justice Act of 1964 making "investigative, expert, or other services necessary to an adequate defense" available to indigent defendants. 18 U.S.C. § 3006A(e). *Garries* was the initial case holding *Ake* applicable to military servicemembers. Consequently, subsequent military decisions often cite to *Garries* in lieu of *Ake* for the principle that an accused must first demonstrate necessity before the government is required to supply competent expert assistance to aid in his defense. Numerous other jurisdictions also have expanded the principles of *Ake* beyond psychiatric assistance to DNA experts, fingerprint experts, intoxication experts, hypnosis experts, and dental experts, where such specialized evidence played a significant role at trial. *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); *Dubose v. State*, 662 So.2d 1189, 1193-94 (Ala. 1995); *Polk v. State*, 612 So.2d 381 (Miss. 1992); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989); *State v. Moore*, 364 S.E. 648 (N.C. 1988); *State v.Coker*, 412 N.W.2d 589 (Iowa 1987); *Thornton v. State*, 339 S.E.2d 240 (Ga. 1986).

46, U.C.M.J., 10 U.S.C. § 846. The President merely requires an accused requesting the testimony of an expert to submit the request first to the convening authority[3], and if that request is denied, to renew the request before the military judge. R.C.M. 703(d). The military judge then shall determine "whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." *Id.* These two military provisions mirror this Court's holdings that, as a matter of fundamental due process, an indigent defendant must be provided "the basic tools of an adequate defense."[4] *United States v. Van Horn*, 26 M.J. 434, 437 (C.M.A. 1988) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

Until the present case, the Court of Appeals for the Armed Forces [hereinafter Court of Appeals] consistently has applied the *Ake* principles to the military justice system in accordance with Article 46 and R.C.M. 703(d). In *Ake*, this Court emphasized the importance of dueling experts in enabling the jury to "make its most accurate determination of the truth on the issue before them." *Ake*, 470 U.S. at

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[3] The convening authority is the officer with the power to create a court-martial and order the accused to trial before that court-martial. Depending upon his rank, that officer may be the commanding officer of the accused or a general officer in command. *See* R.C.M. 504.

[4] "The administration of military justice is rooted in inherent fair play and justice that prevail under the Anglo-American system of law." *United States v. Manuel*, 43 M.J. 282, 286 (1995). In defining the rights of servicemembers under the U.C.M.J., Congress is not limited to the minimum requirements established by the Constitution and, in many instances, has provided protections stronger than those found in the civilian sector. *Id.* In promulgating the Manual for Courts-Martial, the President can go even further than the Constitution and the U.C.M.J. in providing protections for military personnel. *Id.* Article 46 and R.C.M. 703(d), as interpreted by the Court of Appeals for the Armed Forces, are examples of such protections.

81. This Court expressed concern that, without such expert assistance to aid the defense in, *inter alia*, preparing the cross-examination of the government's expert witness, "the risk of an inaccurate resolution" of the central issue in the case increases. *Id.* at 82. In Petitioner's case, however, the Court of Appeals abandoned its adherence to these principles and ignored its own previous rulings interpreting Article 46 and R.C.M. 703(d) as concordant with *Ake*.

B. The necessity of "dueling" experts in drug urinalysis prosecutions.

When scientific evidence of urinalysis testing alone is relied upon to prove drug use, the government may not presume that the judge or courts-martial members[5] are experts capable of interpreting such evidence.[6] *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987). As a result, in a military prosecution for drug use based solely on urinalysis results, the government **must** present expert testimony to assist the judge or members in interpreting the scientific data. *Id.*; *see generally United States v. Campbell*, 50 M.J. 154 (1999) (discussing the complex scientific analysis involved in urinalysis-based drug prosecutions). In *United States v. Van Horn*, a drug use prosecution based solely on urinalysis results, the Court of Appeals relied on the "equal opportunity" clause of Article 46, U.C.M.J. to rule that denying the defense a "meaningful opportunity" to present evidence challenging the government's scientific proof, its reliability, and its

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[5] Members are the military equivalent of jurors in civilian trials.

[6] Scientific principles of urinalysis testing do not qualify as matters of "common sense" or "knowledge of human nature," both of which can properly be used by the trier of fact in considering "the inherent probability or improbability of the evidence." *Murphy*, 23 M.J. at 311; R.C.M. 918(c).

interpretation, deprives an accused of a fair trial. *Van Horn*, 26 M.J. at 436-38 (citing *Murphy*, 23 M.J. at 312). In his concurrence in *Van Horn*, then-Chief Judge Everett explained, "[i]n light of the considerable latitude which this Court has heretofore granted to the Government in its urinalysis program, it is only fair that servicemembers accused of using drugs be given meaningful access to experts who are willing to challenge testing procedures and results." *Van Horn*, 26 U.S. at 439 (Everett, C.J., concurring).[7] Accordingly, in *United States v. Burnette*, also a drug use prosecution relying on urinalysis test results, the Court of Appeals stated that "very little, if any, showing of necessity [is] required to entitle the defense to expert assistance in the interpretation of drug analyses." *Burnette*, 29 M.J. at 475.

More importantly, the lower court ruled in *Burnette* that the prosecution's expert witness does not constitute an "adequate substitute" for an expert requested by the defense under R.C.M. 703. *Id.* at 476. Because the military

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[7] The "considerable latitude" afforded the military in drug use prosecutions includes the abilities to compel servicemembers to produce urine samples for testing and to rely on a test result alone to convict a servicemember of wrongful use "when there is no other evidence of criminality, including no evidence of an observable reaction to the substance." *Campbell*, 50 M.J. at 160. Thus, Petitioner respectfully requests that this Court consider the same principle of fundamental fairness to which then-Chief Judge Everett was referring in light of *United States v. Scheffer*, 523 U.S. 303 (1998) (holding that, even in a drug prosecution relying solely on urinalysis test results, the exclusion of exculpatory polygraph results under Military Rule of Evidence 707 does not violate accused servicemember's constitutional right to present a defense). If the instant decision were to stand, when combined with the inability to admit exculpatory polygraph results upheld by *Scheffer*, servicemembers who do not have specific "innocent ingestion" defenses would be completely unable to defend themselves against urinalysis-based drug charges. As a result, an already harrowing burden on these servicemembers would become insurmountable.

accused, unlike the civilian defendant, has the resources of the government at his disposal, "in the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *Garries*, 22 M.J. at 290-91. However, an expert who, in fact, is "presenting incriminating evidence against [the accused] on behalf of the prosecution" is not an "adequate substitute" for such independent assistance because "it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking." *Burnette*, 29 M.J. at 476 (citing *Van Horn*, 26 M.J. 434). When requested, the government must provide the defense with an independent expert who is not connected to the challenged laboratory. *Van Horn*, 26 M.J. at 437.

According to *Van Horn* and *Burnette*, in order to satisfy the competency requirement under *Ake* and *Garries*, an expert must be sufficiently independent from the prosecution to ensure conflict-free assistance to the defense. *See United States v. Short*, 50 M.J. 370, 377 (1999) (Sullivan, J., dissenting). The Ninth and Tenth Circuits also have interpreted the competency requirements of *Ake* in this manner in holding that, for purposes of confidentiality, a defense expert must be neither "neutral" nor associated with the prosecution in order to satisfy due process. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990); *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986).[8] Furthermore, prior to *Ake*, the D.C. Circuit similarly interpreted 18 U.S.C. § 3006A(e)—the equivalent

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[8] *See also Harris v. Vasquez*, 949 F.2d 1497, 1517 (9th Cir. 1990) (explaining that the confidentiality and independence issues involved in *Smith* were significant to that decision); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (state's duty to an indigent defendant "cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense").

of the *Garries* ruling—as requiring an "independent" expert to aid the defense, because "[t]wo, three, or four psychiatrists for the Government and the court do not constitute adequate expert assistance for the defense." *United States v. Chavis*, 486 F.2d 1290, 1292 (D.C. Cir. 1973).[9]

The rulings of the 9th, 10th, and D.C. Circuits, as well as the lower court's interpretations of Article 46 and R.C.M. 703(d) under *Ake*, are clear. When expert testimony is germane to a "significant issue" at trial and a request for an independent expert is made, any expert assistance provided to the defense by the government must be independent in order to be truly "competent." This aspect of competency—that the expert be neither neutral nor affiliated with the prosecution—is essential to meeting the due process requirements of *Ake*. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1122-23 (6th Cir. 1990) (Martin, J., concurring in part and dissenting in part) ("It is clear that the *Ake* majority did not contemplate a neutral psychiatrist as satisfying due process.")[10] Because the government did not meet its burden of offering competent expert assistance to the defense in this case, Petitioner was clearly denied due process. *See Burnette*, 29 M.J. at 476.

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[9] *See also United States v. Bass*, 477 F.2d 723 (9th Cir. 1973) (prosecutor should have no influence in selection of defense expert); *Marshall v. United States*, 423 F.2d 1315, 1319 (10th Cir. 1970) (expert who shares "a duty to the accused and a duty to the public interest" is burdened by "an inescapable conflict of interest").

[10] "Indeed, Justice Rehnquist assailed the majority in his dissenting opinion [in *Ake*] for establishing the right to a 'defense consultant'." *Kordenbrock*, 919 F.2d at 1123 (Martin, J., concurring in part and dissenting in part) (citing *Ake*, 470 U.S. at 87). "Moreover, in *Ake*, the Court all but overruled *United States ex rel Smith v. Baldi*, 344 U.S. 561[ ] (1953), where the state had supplied neutral psychiatrists." *Id.*

C. Denial of competent expert assistance by the military judge.

Petitioner satisfied every existing requirement of the law in an attempt to obtain independent expert assistance to aid in his defense. Petitioner exhausted every available remedy by submitting a request for expert assistance first to the convening authority,[11] and then to the military judge, as required by R.C.M. 703(d). *United States v. Short*, 50 M.J. 370, 371 (1999). Consistent with both *Burnette* and *Van Horn*, Petitioner requested "the opportunity to have somebody, who is not employed by the drug lab, assess the chain of custody and procedures which were used by the drug lab." *Id.*[12]

The prosecutor, in fact, conceded that petitioner was entitled to expert assistance. *Id.* at 372. However, contrary to the requirements of *Burnette* and *Van Horn*, the prosecutor would not acknowledge that Petitioner was entitled to an independent expert, unaffiliated with the Jacksonville lab. By offering defense counsel the assistance of Mr. Hall, the military judge also conceded that the defense was in need of expert assistance. *See id.* at 374 (Sullivan, J., dissenting). However, the military judge erroneously ruled that, since Mr. Hall was available to consult with defense counsel, petitioner had failed to meet his burden of showing "necessity" and denied the motion. *Short*, 50 M.J. at 372.[13]

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[11] The prosecution recommended that the convening authority deny the request, claiming that "a suitable substitute" was available from the Naval Drug Screening Lab in Jacksonville. *Short*, 50 M.J. at 371.

[12] Defense counsel argued that "[i]t is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used." *Short*, 50 M.J. at 371.

[13] The military judge erroneously found that the prosecution's principal witness would "not be here to represent either party" and would be "equally available to both the Government and defense . . . without

By contradicting the law under *Burnette* and *Van Horn*, the military judge's ruling failed to comply with the "equal opportunity" requirement of Article 46 and the "adequate substitute" requirement of R.C.M. 703(d), as well as violating the constitutional due process requirements of *Ake*. Nevertheless, the Court of Appeals for the Armed Forces upheld the military judge's ruling. Ignoring its prior rulings in *Van Horn* and *Burnette*, the Court of Appeals incorrectly held that the military judge did not abuse his discretion by denying the request for independent expert assistance because Petitioner failed to show "necessity." *Id.* at 373.[14]

The Court of Appeals majority further erred in revisiting the issue of "necessity," which had been conceded on the record by the government.[15] *Short*, 50 M.J. at 377 (Sullivan, J., dissenting); *id.* at 378 (Effron, J., dissenting). Since the military judge did not expressly reject

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shading his testimony to favor either side in this case." *Short*, 50 M.J. at 376 (Sullivan,J., dissenting).

[14] In a highly convoluted and circular decision, the Court of Appeals majority confused a request for non-military expert assistance, the basis for the *Garries* ruling, with Petitioner's request for any expert assistance not affiliated with the Jacksonville drug lab where Petitioner's sample was tested. *See Short*, 50 M.J. at 373; *Garries*, 22 M.J. at 290-91. Significantly, unlike the accused in *Garries*, Petitioner did not reject assistance from all government experts. *Short*, 50 M.J. 370, 377 (Sullivan, J., dissenting). The defense only rejected assistance from a particular government expert, Mr. Hall, who was both testifying for the prosecution against Appellant and employed by the Jacksonville lab. *Id.* The majority also confused petitioner's initial request for a specific, named, civilian expert witness with his ultimate request for expert assistance from any expert independent of the Jacksonville lab to assist in defense preparation. *See Short*, 50 M.J. at 373.

[15] The prosecution affirmatively conceded that issue when the prosecutor stated that, "the Government does not contest in any way, shape or form that the accused is entitled to expert assistance." *Short*, 50 M.J. at 378 (Effron, J., dissenting).

that concession, the lower court was obligated to accept it "for the same reason that any trial waiver is accepted on appeal—the concession relieved the defense from any burden." *Short*, 50 M.J. at 378 (Effron, J., dissenting) (citing S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992)). The scope of the lower court's review in this case was substantially limited by the government's concession that Petitioner was entitled to government-funded expert assistance. *Id.* at 376 (Sullivan, J., dissenting).[16] In this respect, the Court of Appeals majority exceeded its authority in revisiting the question of "necessity" in this case.[17] Thus, the only question this Court must review in this case is whether the prosecution's sole and essential expert witness constituted "competent" expert assistance under *Ake v. Oklahoma* in light of his clear conflict of interest and resulting lack of independence.

D. Why this decision cannot stand.

The United States military has prosecuted thousands of servicemembers for drug use based solely on positive drug urinalysis results.[18] Relying solely on the same

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[16] "A party who voluntarily . . . takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives . . . his right to have such judgement . . . reviewed by an appellate court." *Short*, 50 M.J. at 376 (Sullivan, J., dissenting) (citing 4 C.J.S. Appeal and Error § 185 at 255 (1993)).

[17] Petitioner's assertion that the lower court exceeded its jurisdiction under Article 67(c), U.C.M.J., is another reason for this Court to grant review in this case. *See Clinton v. Goldsmith*, 119 U.S. 1538 (1999).

[18] In fiscal year 1998 alone, the Defense Manpower Data Center reported that 14,175 servicemembers tested positive for illegal drug use in urinalysis tests. Since FY93, the Navy alone has averaged 7,208 positive test results per year. Courts-martial based on these positive test results began in 1982. Those convicted at general or special courts-

complex scientific evidence, thousands more will be prosecuted in the future.[19] Like the psychiatric testimony in *Ake*, the evidence presented by the prosecution experts in these cases is essential to prove the central issue in dispute: whether the accused, in fact, knowingly and wrongfully used drugs. Unlike typical criminal prosecutions, no witness to the crime testifies that the accused used drugs in urinalysis cases. The only witnesses presented by the prosecution are the "observer" who watched the accused give his sample, the "urinalysis coordinator" who testifies regarding the chain of custody at the command, and, most importantly, the "drug lab expert" who assists the

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martial will carry federal criminal convictions, with all of the collateral consequences of those convictions, for the rest of their lives. The maximum punishment a servicemember may receive for a single conviction of marijuana use is a dishonorable discharge, forfeiture of all pay and allowances, and two years confinement. Convictions for use of other Schedule I, II, or III controlled substances carry a maximum sentence of five years confinement. MCM (1998 ed.), Part IV, ¶37 (e)(1).

[19] This Court has never directly ruled on the constitutionality of these prosecutions. While theoretically the burden remains on the government to prove the elements of knowing and wrongful use, once the positive results of the urinalysis tests are admitted a "permissive inference" of wrongfulness can be made by the jury members in order to convict the servicemember. MCM (1998 ed.) Part IV, ¶37 (c)(5). Thus, as a practical matter, once the urinalysis results are admitted into evidence, the burden shifts to the accused to show that either a) the test results are unreliable/inaccurate or 2) he/she somehow "innocently ingested" the drug. The government's reliance on a permissive inference and the resulting burden shift accentuate the critical importance of an accused's access to independent experts who can assist with challenging the lab results, identifying potential deficiencies in testing procedures, and cross-examining the government's expert witness from the lab. Without access to this sort of assistance—the same assistance the government is required to use under *Murphy*—an accused who does not have a specific "innocent ingestion" defense would be stripped of any ability to present a defense.

government in explaining the scientific testing procedures used in the lab. As in *Ake*, the reliability of the drug testing procedures and the accuracy of the lab results are generally the most "significant factor[s] at trial." *See Ake*, 470 U.S. at 83.[20] Therefore, the independent, confidential expert sought by Petitioner in this case was consistent with the due process requirement of "competency" mandated by this Court in *Ake* and applied to the military in *Garries*.

The Court of Appeals' decision in Petitioner's case will provide military judges in drug urinalysis prosecutions with a legal basis for denying independent, conflict-free expert assistance to all servicemembers accused of drug use based on urinalysis results. This denial of "meaningful access to experts who are willing to challenge [the] testing procedures and results" would deprive every servicemember prosecuted for these offenses of a fair trial. *Van Horn*, 26 M.J. at 439 (Everett, C.J., concurring). Forcing these servicemembers to rely on the prosecution's sole expert witness for assistance in challenging the government's scientific proof—which that very witness is presenting on behalf of the government—clearly constitutes the type of due process violation feared in *Ake*.[21] The

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[20] Due to the heightened significance of the complex scientific evidence in these cases, the role of "dueling" experts in enabling the jury to "make its most accurate determination of the truth on the issue before them"—whether the accused knowingly and wrongfully used drugs—acquires even more importance. *See Ake*, 470 U.S. at 81. Without such independent expert assistance to aid the defense in effectively preparing for trial and cross-examining the prosecution expert, "the risk of an inaccurate resolution" of the central issue increases in the government's favor. *See id.* at 82.

[21] *See United States v. Sebring*, 44 M.J. 805 (N.M. Ct. Crim. App. 1996) (where government expert from the Norfolk drug lab testified that lab's testing procedures were reliable while withholding information regarding an investigation of that lab which found that employees had falsified lab results, illustrating that a drug expert

unique legal bases of these prosecutions, however, makes the constitutional deprivation even more dangerous.

No military defense attorney should be required to acquire the type of complex scientific knowledge in order to effectively defend her client that the Court of Appeals has concluded the prosecutor, military judge, or members cannot be expected to learn. *See Murphy*, 23 M.J. at 310, 312. The result of this case clearly violates the "equal opportunity" clause of Article 46, U.C.M.J., as well as, the "adequate substitute" requirement of R.C.M. 703(d). Under Article 36, U.C.M.J., 10 U.S.C. § 836, the "adequate substitute" requirement of R.C.M. 703(d) should be interpreted in a manner consistent with the holdings of the 9th, 10th, and D.C. Circuits. As it stands, this decision is in direct conflict with the law in those circuits, as well as the law of this Court in *Ake*.

The Court of Appeals' erroneous ruling in this case now could be applied to requests for expert assistance in other prosecutions for more serious offenses. Military judges now may use this ruling to force the defense to "share" the prosecution expert witness in child molestation cases, murder cases, rape cases, and the like. The forced sharing of these types of psychiatric/psychological or DNA experts would clearly violate due process under *Ake*. Since this type of due process violation is not being tolerated by the various circuit courts, and presumably would not be tolerated by this Court in interpreting 18 U.S.C. § 3006A(e), it should not be tolerated in the military either. Allowing this decision to stand would severely jeopardize every servicemember's right to a fair trial in any court-martial where expert testimony is presented by the government.

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employed by the testing lab is not as neutral and detached as the military judge's findings in Petitioner's case would imply).

CONCLUSION

The military judge clearly erred in finding that, since the prosecution's expert witness was available to assist the defense, Petitioner had not demonstrated "necessity" for an independent expert. As a result of this error, Petitioner was denied his rights to constitutional and military due process at his court-martial. The lower court's decision upholding this ruling stands to endanger the due process rights of all servicemembers tried at courts-martial where expert testimony is presented by the government. This Court must not allow this decision to stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1999

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 98-0265

Crim.App. No. 95 1617

United States, *Appellee*

v.

Darrin L. SHORT, Aviation Structural Mechanic
(Hydraulics) Second Class
U.S. Navy, *Appellant*

Argued Nov. 17, 1998

Decided May 26, 1999

For Appellant: *Lieutenant Commander L. J. Lofton*, JAGC, USN (argued); and *Lieutenant Commander R.C. Klant*, JAGC, USN, *Lieutenant Commander Rebecca Gilchrist*, JAGC, USN, and *Lieutenant Syed N. Ahmad*, JAGC, USNR (on brief).

For Appellee: *Major Clark R. Fleming*, USMC (argued); *Commander D.H. Myers*, JAGC, USN (on brief); *Colonel Charles Wm. Dorman*, USMC, and *Major Clark R. Fleming*, USMC. *Opinion of the Court*

GIERKE, Judge:

A special court-martial composed of officer members convicted appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The adjudged and approved sentence provides for a bad-conduct discharge and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

This Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A GOVERNMENT URINALYSIS EXPERT TO ASSIST IN HIS DEFENSE.

We hold that the military judge did not abuse his discretion, for the reasons set out below.

Factual Background

The charges against appellant were based on a positive urinalysis, in which appellant's sample contained 16 nanograms per milliliter of the metabolite of marijuana, 1 nanogram over the Department of Defense cutoff for reporting samples as positive. Before trial, defense counsel submitted a request to the convening authority for the production of Dr. William Manders, a forensic toxicologist, to testify concerning passive inhalation and innocent ingestion. Trial counsel recommended that the request be denied, on the ground that a suitable substitute was available from the Naval Drug Screening Laboratory, Jacksonville, Florida.

When the court-martial convened, the convening authority had not yet acted on the request. Defense counsel renewed her request at an Article 39(a)1 session before the military judge. The parties stipulated that Dr. Manders would testify that "both innocent ingestion and passive inhalation could lead to the positive test for THC, the metabolite found in marijuana, based on the levels found in the sample submitted by Petty Officer Short."

Defense counsel asserted at trial that the government witnesses would not testify that passive inhalation could produce marijuana metabolites at the level of 16 nanograms per milliter. Trial counsel disputed her assertion and argued that the Government was able to produce an adequate substitute for Dr. Manders.

As the Article 39(a) session progressed, defense counsel broadened the scope of her request for assistance. She requested "the opportunity to have somebody, who is not employed by the drug lab, assess the chain of custody and procedures which were used by the drug lab." She argued that "[i]t is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used." The military judge denied the motion to compel production of Dr. Manders as not ripe for resolution, since the convening authority had not yet acted. The court-martial then recessed on May 31, 1995.

When the court-martial reconvened on August 8, 1995, defense counsel filed a motion for expert assistance requesting "independent (i.e., unaffiliated with the Naval Drug Screening Laboratory, Jacksonville) expert assistance." She asserted that the independent expert assistance was needed for the following purposes: "(a) to assist defense in

understanding the scientific evidence (b) identifying problems with the scientific evidence and (c) preparing effective cross-examination of the government witness regarding the scientific evidence."

In support of her expanded request, defense counsel stated the following:

> The defense counsel in this case has no background in chemistry beyond basic high-school chemistry. Moreover, defense counsel does not have the knowledge of the drug-testing system used at NDSL Jax which would enable her to effectively cross-examine an expert in that area. The Standard Operating Procedure manuals are so voluminous and technical that defense counsel is unable to develop the required expertise independently.
>
> The Government will be assisted in interpretation and presentation of its evidence by the expert scientific knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax. The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

During argument on defense counsel's expanded request, trial counsel conceded that appellant was entitled to expert assistance, but would not concede that he was entitled to an independent expert, unaffiliated with the Navy Drug Screening Laboratory. Trial counsel asserted that adequate assistance was available from Mr. Cary Hall, "an

independent and objective expert." When defense counsel disputed trial counsel's assertion that Mr. Hall was "impartial," the military judge asked her, "Did you have an opportunity to talk with Mr. Hall yourself?" She responded, "Sir, I have not talked to him, nor do I intend to."

Before ruling on the defense request for assistance, the military judge offered the following advice:

> First let me say that one of the things that I certainly would encourage the defense counsel to do in this case, or any case, when it deals with a certain area of specificity or expertise, would be to call other defense counsel who have had experience in handling cases involving the drug labs and urinalyses in the past because they can provide assistance to you in how to go about litigating these cases, and there are a number of people on active duty in the naval service that are available to assist you in preparing a defense for this kind of case.

The military judge found that Mr. Hall was available "to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and the Department of the Navy drug testing." He found further that "Mr. Hall is made equally available to both the Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side in this case." Finally, he found that "Mr. Hall will readily fully explain the urinalysis testing procedures at the Navy Drug Screening Lab, Jacksonville, Florida, including any

difficulties, errors, or problems that the lab may have encountered generally or specifically with regard to the testing of the accused's sample."

The military judge then recited the defense burden of showing necessity and ruled that the defense had failed to meet that burden. Accordingly, he denied the motion for independent expert assistance.

The court-martial then recessed on August 8 and reconvened on August 15 for the trial on the merits. Mr. Hall testified for the prosecution regarding appellant's positive urinalysis. Defense counsel cross-examined Mr. Hall extensively about testing methods, control procedures, the likelihood of false positives, and the chain of custody. Defense counsel elicited admissions from Mr. Hall that some Navy laboratories, including the laboratory that tested appellant's sample, had experienced problems with testing accuracy. Defense counsel also elicited an admission that appellant's nanogram level was consistent with unknowing ingestion.

Appellant testified in his own defense and repeatedly denied knowingly using marijuana. He testified that he did not know why the marijuana metabolite was found in his urine. He testified that he was "very positive that [he] did not use, ingest, marijuana knowingly in any shape or form."

Discussion

RCM 703(d), Manual for Courts-Martial, United States (1998 ed.),2 authorizes the employment of experts at government expense when their testimony would be relevant and necessary, and when the Government cannot or will not provide an adequate substitute. An accused is not automatically entitled to an independent expert in every

urinalysis case. However, upon a proper showing of necessity, an accused is entitled to expert assistance to prepare a defense. *United States v. Burnette*, 29 MJ 473, 475 (CMA 1990). An accused is not, however, entitled to a specific expert of his own choosing. "All that is required is that competent assistance be made available." *Id.* As this Court observed in *United States v. Garries*, 22 MJ 288, 290-91 (1986), "In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." In *United States v. Gonzalez*, 39 MJ 459, 461 (1994), this Court adopted a three-pronged test for showing that expert assistance is necessary:

> First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

In *United States v. Kelly*, 39 MJ 235, 238 (1994), this Court stated that "[d]efense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case," using "a number of primary and secondary materials" that are readily available. *See e.g.*, E. Imwinkelried, *The Methods of Attacking Scientific Evidence* (2d ed. 1992), cited in *Kelly*, *supra* at 238. Due process requires that the accused be given the "basic tools" necessary to present a defense, but defense counsel is responsible for doing his or her homework. *See Kelly, supra* at 237, citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

We review the military judge's decision on a request for expert assistance for abuse of discretion. *See United States v.*

Washington, 46 MJ 477, 480 (1997), citing *Garries*, *supra* at 291.

Applying the foregoing principles, we hold that the military judge did not abuse his discretion by denying the request for independent expert assistance. The defense offered nothing to show that appellant's case was not "the usual case." *See Garries*, *supra* at 290-91.

With respect to her original request for expert assistance to establish passive inhalation or innocent ingestion, defense counsel failed to show necessity. Although she refused to talk to Mr. Hall and insisted that he could not support the defense theory of innocent ingestion, the record reflects the contrary. Defense counsel made her point in cross-examination of Mr. Hall, when he agreed that appellant's urinalysis results were consistent with passive inhalation or innocent ingestion.

With respect to defense counsel's attempt to expand her request, we hold that the military judge did not abuse his discretion. He recognized defense counsel's attempt for what it was: an assertion that she did not know how to try a urinalysis case. He responded appropriately by suggesting that defense counsel consult with more experienced counsel and talk to Mr. Hall about the scientific procedures involved in this case. Defense counsel responded that she would not talk to Mr. Hall, even though basic trial preparation would require that he be interviewed, because he was expected to testify on the merits.

The record of trial does not reflect whether defense counsel heeded the military judge's advice. In fact, nowhere in the record did defense counsel describe what attempts she made to educate herself, before or after the military judge's gratuitous advice.

While Mr. Hall could not satisfy defense counsel's request for an independent expert, the military judge gave defense counsel "the tools potentially to gather evidence to lay a foundation for the necessity of an independent [assistant]." *Gonzalez*, 39 MJ at 461, citing *United States v. Kelly*, *supra*. After having a week to heed the military judge's advice, defense counsel did not renew her request for expert assistance when the court-martial convened for the trial on the merits.

Even with the benefit of post-trial hindsight, appellant still did not satisfy the *Gonzalez* test. The record reflects that defense counsel cross-examined Mr. Hall exhaustively, elicited potentially damaging admissions about problems with testing accuracy in his laboratory, and elicited scientific support for the defense theory of innocent ingestion.

In sum, there is nothing in this record to show necessity for an independent expert and nothing to show that the trial was rendered unfair by the military judge's refusal to order that an independent expert be provided. Accordingly, we hold that the military judge did not abuse his discretion.

Decision

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

FOOTNOTES:

1 Uniform Code of Military Justice, 10 USC § 839(a).

2 This Manual provision is the same as the provision that was in effect at the time of appellant's offense and court-martial.

SULLIVAN, Judge (dissenting):

It is a fundamental right that the defense should be able to have expert help if it is *necessary*. *See, e.g.*, Art. 46, Uniform Code of Military Justice, 10 USC § 846. The majority has confused the defense's burden of showing that expert assistance is needed with the right to have an unconflicted expert once it is conceded that an expert is needed. Disregarding the *trial counsel's concession that expert assistance was necessary* in this case, and the fact that the judge implicitly ruled that expert assistance was necessary by offering the defense an expert to assist in its case, the majority relitigates the necessity question in place of an appropriate adequacy inquiry. Under the circumstances of this case, a judge cannot offer as the only expert to the defense a conflicted one, *i.e.*, the principal prosecution expert witness.

This Court granted review in this case on March 13, 1998. Appellant asked:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A GOVERNMENT URINALYSIS EXPERT TO ASSIST IN HIS DEFENSE.

I would hold that the military judge prejudicially erred when he only made available the prosecution's chief witness as an expert to assist the defense in this drug urinalysis case. *United States v. Burnette*, 29 MJ 473, 476 (CMA 1990); *United States v. Van Horn*, 26 MJ 434, 438 (CMA 1988). Fair is fair, and it is not fair for the judge to give as the defense's only option for expert help the service of the main

prosecution witness.1 Surely the judge must have realized the apparent conflict of interest of an expert who is given to help both sides of the same case. If there is a case that can be summed up by a phrase from the Bible, this is that case -- "No man can serve two masters."2 How could the judge give the defense an expert witness whose main job would be to defeat the opposing expert witness (himself)?

Let us look at how this situation developed for the judge to commit his error. On March 23, 1995, appellant provided a urine sample as part of a unit sweep ordered by the Commanding Officer, Naval Air Station Atlanta, Georgia. It tested positive for the metabolite of marijuana, tetrahydrocannabinol (THC), at 16 nanograms per milliliter, 1 nanogram over the Department of Defense cutoff for samples to be declared positive. Appellant was then charged with the wrongful use of marijuana in violation of Article 112a, UCMJ, 10 USC § 912a.

In a letter dated May 23, 1995, defense counsel requested that the convening authority produce Doctor William Manders as an expert witness in appellant's court-martial and to provide expert assistance to the defense on matters of innocent ingestion and passive inhalation. Trial counsel, in a letter to the convening authority on May 31, 1995, recommended denial of this witness and assistance request, in part on the basis that a "substitute expert" from the Naval Drug Screening Laboratory at Jacksonville, Florida, could be made available who could provide the same testimony and assistance as Doctor Manders. The parties to this trial later stipulated that Doctor Manders would testify that "both innocent ingestion and passive inhalation could lead to the positive test for THC, the metabolite found in marijuana, based on the levels found in the sample submitted by Petty Officer Short."

At an Article 39(a)3 session prior to trial, defense counsel again submitted a request for an expert assistant dated July 25, 1995. It stated, *inter alia*:

I. NATURE OF THE MOTION

> In order to properly prepare for trial and effectively represent Petty Officer Short, the defense respectfully requests *independent (i.e., unaffiliated with the Naval Drug Screening Laboratory, Jacksonville) expert assistance* for the following purposes: (a) to assist defense in understanding the scientific evidence (b) identifying problems with the scientific evidence and (c) preparing effective cross-examination of the Government witness regarding the scientific evidence.
>
> The accused respectfully moves the Court to enter an order directing the government to provide *an independent expert assistant* . . . .

* * *

II. STATEMENT OF FACTS

> On 23 March 1995, AMH2 Short provided a urine sample during a unit sweep of personnel stationed at Naval Air Station, Atlanta. The sample was processed at the Naval Drug Screening Lab, Jacksonville ["NDSL Jax"] between 29 March 95 and 4 April 95. The results of this analysis include complex graphs, charts, and scientific terminology.
>
> The defense counsel in this case has no background in chemistry beyond basic high-school chemistry.

> Moreover, defense counsel does not have the knowledge of the drug-testing system used at NDSL Jax which would enable her to effectively cross-examine an expert in that area. The Standard Operating Procedure manuals are so voluminous and technical that defense counsel is unable to develop the required expertise independently.
>
> *The Government will be assisted in interpretation and presentation of its evidence by the expert scientific knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax.* The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

(Emphasis added.)

Defense counsel later noted the purpose for her request for independent expert assistance, as follows:

> DC: As far as another step that the defense must go through is to show what the defense assistant is required for. We are requesting defense's expert assistance *to explain the documentation in the evidence packet, to point out what discrepancies to look for in this documentation, to help to compare the documentation as the process -- the testing was performed to the DoD SOP of how it is supposed to happen, to point out weaknesses in the Government's case and to help to prepare an effective cross-examination of the Government's witness.*

* * *

> Sir, the case law -- to address a couple of points from the Government, first of all, the case law clearly states that expertise, if necessary, is applicable in all cases of court. Now, do we want an expert to write out our cross-examination questions for us? No. *But do we know what type of questions to ask unless we have the type of knowledge to see the deficiencies in the Government's case, to see the weaknesses in the government witnesses' [sic] argument? This is not only with regard to this test in particular* but also with regard to the Government – his expert is going to be explaining why the problem in the Norfolk drug lab wasn't -- isn't applicable. How do we know the intricacies of all of these problems and all these discrepancies unless we have an expert?
>
> * * *
>
> MJ: Did you have an opportunity to talk with Mr. Hall yourself?
>
> DC: Sir, I have not talked to him, nor do I intend to. *The one -- another aspect of expert assistant [sic] is confidentiality, and Mr. Hall clearly cannot perform one of the functions of being an expert assistant for the defense of confidentiality. I don't know how he would compartmentalize his brain in that way so that he could perform that function*, and, similarly, there is nobody that I can talk to until I have confidentiality.

(Emphasis added.)

The military judge ultimately denied the defense request. He stated:

MJ: First let me say that one of the things that I certainly would encourage the defense counsel to do in this case, or any case, when it deals with a certain area of specificity or expertise, would be to call other defense counsel who have had experience in handling cases involving the drug labs and urinalyses in the past because they can provide assistance to you in how to go about litigating these cases, and there are a number of people on active duty in the naval service that are available to assist you in preparing a defense for this kind of case.

MJ: I further make the following essential findings:

That Mr. Cary Hall of the Navy Drug Screening Lab, Jacksonville, Florida, is a recognized expert in the field of urinalysis testing.

That Mr. Hall will not be here to represent either party to this litigation, but to explain the procedures followed at the drug screening lab in Jacksonville and to analyze the evidence and interpret the test results.

MJ: That Mr. Cary Hall of the Navy Drug Screening Lab, Jacksonville, Florida, is available to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and Department of the Navy drug testing.

That Mr. Hall is available at no expense to the defense.

That Mr. Hall is made equally available to both the

Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side in this case.

That Mr. Hall will readily fully explain the urinalysis testing procedures at the Navy Drug Screening Lab, Jacksonville, Florida, including any difficulties, errors, or problems that the lab may have encountered generally or specifically with regard to the testing of the accused's sample.

That the burden is on the accused to show the necessity for services of an expert assistant by showing the reasonable probability that the expert would be of assistance and that denial of expert assistance would result in a fundamentally unfair trial.

That the accused has failed to meet this burden.

That the assistance of Mr. Cary Hall is sufficient in this case to ensure that the accused receives due process and a fair trial.

That the assistance of Mr. Cary Hall is sufficient to ensure that the accused can present an adequate defense.

MJ: And the motion is denied.

(Emphasis added.)

At the outset, I note that the scope of our appellate review in this case is substantially limited by trial counsel's concession that appellant was entitled to government-funded expert

assistance in this urinalysis prosecution.4 *See generally* 4 C.J.S. Appeal and Error § 185 at 255 (1993) ("A party who voluntarily . . . takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives . . . his right to have such judgement . . . reviewed by an appellate court."). Normally, I would review the trial judge's decision denying such assistance in light of the three-prong test of *United States v. Gonzalez*, 39 MJ 459 (CMA 1994). Under *Gonzalez*, it is the defense's burden to show why expert assistance is needed; what it would accomplish for the accused; and why defense counsel is unable to gather such evidence himself. *Id.* at 461; *see United States v. Kelly* 39 MJ 235, 238 (CMA 1994). Here, however, trial counsel's concessionary tactics made it unnecessary for the defense to fully develop the record on these factual matters. *See generally* S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992). Thus, I need only decide whether the expert assistance actually proffered to the defense was sufficient to satisfy the Government's duty to provide "competent" expert assistance. *Id.*; see *United States v. Ndanyi*, 45 MJ 315, 319-20 (1996); *Burnette*, 29 MJ at 475.

I further note that the defense rejected assistance in this case only from a particular government expert, offered by trial counsel and approved by the military judge, not from all government experts. Cf. *Burnette*, *supra* at 476 ("Not only had the defense limited its request to the named civilian experts; it also had specifically rejected the assistance of *any* Government experts."). Here, defense counsel noted in her initial proffer that

> [t]he Government will be assisted in interpretation and presentation of its evidence by the expert scientific

> knowledge, opinions, and testimony of Mr. Cary Hall, an expert from NDSL Jax. The Executive Officer of NDSL Jax has already stated that the command has a policy to "not allow" their personnel to "testify against each other" in courts-martial.

She further stated, "If an independent expert from another drug lab is appointed, the prejudice to the accused, although not eliminated, would be greatly reduced." Thus, the precise question before us is whether the particular government expert proffered as an assistant to the defense, *i.e.*, the prosecution's chief witness, constituted "competent" expert assistance as required by *Burnette* and *Ndanyi*.

As noted above, the type of expert assistance proffered by the Government and approved by the military judge must be "competent" to assist an accused in preparing his defense. As we recently said in *Ndanyi*, the Government, "in the usual case," may satisfy this responsibility by providing "the investigative, medical, and other expert services available in the military." 45 MJ at 319 (quoting then—Judge Cox's opinion in *United States v. Garries*, 22 MJ 288, 290-91 (CMA 1986)). However, we also have said that such assistance is not sufficient where there is a showing by the accused at trial that his case is "unusual, *i.e.*, the proffered scientific experts at the . . . laboratory were unqualified, incompetent, *partial*, or unavailable." *Id.* at 320 (emphasis added).

In *Burnette*, then—Judge Cox, speaking for the Court, more particularly addressed this substitution problem in the context of drug experts in urinalysis cases. He said:

> It is well established that, upon a proper showing of necessity, an accused is entitled to the assistance of an

> expert to aid in the preparation of his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *United States v. Garries*, 22 MJ 288 (CMA), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986). *See United States v. Johnson*, 22 USCMA 424, 47 CMR 402 (1973). This does not mean, however, that an accused is entitled to an expert of his own choosing. All that is required is that competent assistance be made available. *Ake v. Oklahoma*, *supra* at 83, 105 S.Ct. at 1097; *United States v. Toledo*, 25 MJ 270, 276 (CMA 1987).
>
> As to the instant case, we agree that very little, if any, showing of necessity was required to entitle the defense to expert assistance in the interpretation of drug analyses. *See United States v. Murphy*, 23 MJ 310 (CMA 1987). *Independent assistance – if desired – should have been provided.*

29 MJ at 475 (footnote omitted) (emphasis added*); see also Van Horn*, 26 MJ at 439 (Everett, C.J., concurring) ("[I]t is only fair that servicemembers accused of using drugs be given meaningful access to experts who are willing to challenge testing procedures and results."); *United States v. Robinson*, 39 MJ 88, 90 (CMA 1994) (Cox, J., dissenting) (condemning strict application of "golden rule" in urinalysis cases.)

In this light, I note that it was well known to the military judge that Mr. Cary Hall was expected to be the chief witness for the prosecution at this court-martial and was treated as such throughout this trial. It was also established that he was employed by the very laboratory which tested appellant's urine and reported it positive. Finally, he was the supervising officer for the laboratory testing process during the period

appellant's urine was tested and was responsible for the reports on drugs generated by the laboratory for purposes of litigation. Thus, the defense, who repeatedly requested any independent expert (*cf. Ndanyi, supra* at 319), was ultimately provided one who was obviously conflicted. *See Burnette, supra* at 476 (unfair "to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking"); *Van Horn, supra* at 437-38 (independent expert required over expert with connection to the challenged laboratory). This was legal error. *Id.; see United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985).

Of course, even an erroneous denial of a defendant's request for expert assistance does not *per se* require reversal of his conviction. *See generally Moore v. Reynolds*, 153 F.3d 1086, 1112 (10th Cir. 1998)(undeveloped assertions that denied expert assistance would be beneficial do not show sufficient prejudice). Here, however, as noted above, the prosecution's case against appellant rested entirely on urinalysis evidence. *See generally United States v. Manuel*, 43 MJ 282, 287 (CMA 1995); *United States v. Murphy*, 23 MJ 310 (CMA 1987) (drug convictions based exclusively on urinalysis evidence require careful scrutiny by factfinders and appellate courts). In addition, this urinalysis evidence was marginal in the sense that it exceeded the Department of Defense cutoff by a single nanogram/milliliter and was only "within 10 percent of the cutoff" for its confirmation test. *See Van Horn, supra* at 237-38 (nanogram count and cutoff evidence goes to weight and reliability of prosecution's case); *see also United States v. Mack*, 33 MJ 251 (CMA 1991).

Finally, the record before us shows "[trial] defense counsel did not make a single inquiry into the specific technical data or documentation underlying appellant's positive urinalysis."

Final Brief at 14; *cf. United States v. Carlos*, 906 F.Supp. 582, 591 (D. Kan. 1995)(examination of record shows no cross-examination deficiency). In these circumstances, the possibility of prejudice resulting from the military judge's failure to provide independent expert assistance to the defense is too great to permit affirmance of this conviction. *See United States v. Crews, supra; United States v. Sloan, supra.*

My Brother, Judge Effron, has very similar views on this case, and I join him and his well articulated dissent.

FOOTNOTES:

1 I find that the judge erred here in the narrow circumstances of this close case. I do not hold that a government laboratory could never furnish expert help to both sides in a contested case. That question is an open one for this Court.

2 The Bible, Matthew (6:24).

3 Uniform Code of Military Justice, 10 USC § 839(a).

4 Trial counsel said, "[T]he Government does not contest in any way shape or form that the accused is entitled to expert assistance. In fact, that expert assistance [Mr. Cary Hall] is available and has been since the beginning of this case."

EFFRON, Judge, with whom SULLIVAN, Judge, joins (dissenting):

In order to obtain any expert assistance at government expense, the defense must show the necessity for it. *United States v. Gonzalez*, 39 MJ 459, 461 (CMA 1994); *see United States v. Burnette*, 29 MJ 473, 475 (1990); RCM 703(d), Manual for Courts-Martial, United States (1998 ed.). In this

case, the prosecution affirmatively conceded this point when trial counsel stated that "the Government does not contest in any way, shape, or form that the accused is entitled to expert assistance." Unless the military judge expressly rejects such a concession, which the judge here did not do, it must be accepted by this Court for the same reason that any trial waiver is accepted on appeal -- the concession relieved the defense from any burden. *See generally* S. Childress and M. Davis, 1 *Federal Standards of Review* § 6.03 at 6-28 to 6-29 (2d ed. 1992).

In order to satisfy the defense need for expert assistance, the Government offered Dr. Cary Hall. Dr. Hall was the same person who had provided expert assistance to the prosecution and who was to be the Government's chief witness against appellant.

In that context, Dr. Hall clearly was conflicted in providing the defense with expertise with which to contest the charge at issue. *See United States v. Ndanyi*, 45 MJ 315, 319 (1996); *United States v. Van Horn*, 26 MJ 434, 437-38 (CMA 1988).

It is also noteworthy that Dr. Hall was the supervising officer for the testing process at the Naval Drug Screening Laboratory, Jacksonville, Florida, which was the laboratory that had performed the testing on appellant's sample. Moreover, he was responsible for the reports on drugs generated by that laboratory for purposes of litigation. Defense counsel's contention -- "It is unlikely that an employee of the drug lab is going to point out deficiencies or problems in the procedures used" -- is underscored by the laboratory policy to not allow their personnel to testify against each other in a court-martial.

In light of the Government's express concession of the need for defense expert assistance, the conflict flowing from Dr. Hall's status as the principal prosecution witness against appellant, and the laboratory's own policy precluding its personnel from testifying against each other, I disagree with the majority's conclusion that the defense failed "to show necessity for an independent expert," ___ MJ at (9). The military judge abused his discretion when he denied the requested assistance, and, for the reasons discussed by Judge Sullivan, appellant was prejudiced by this error.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

WILLIAM J. LUCAS K.T. SEFTON
LARRY D. WYNNE

UNITED STATES

v.

Darrin L. SHORT, 309-68-9909
Aviation Structural Mechanic (Hydraulics)
Second Class (E-5), U.S. Naval Reserve

NMCM 95 01617 Decided 10 November 1997

Sentence adjudged 17 August 1995. Military Judge: B.Q. Clemmons. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Air Station Atlanta, Marietta, GA.

LT SYED N. AHMAD, JAGC, USN, Appellate Defense Counsel

LT BENNETT J. LEE, JAGC, USNR, Appellate Government Counsel
Maj CLARK R. FLEMING, USMC, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's response. We also heard

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[1] I. THE TRIAL JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR EXPERT ASSISTANCE.

II. THE TRIAL COUNSEL COMMITTED REVERSIBLE PLAIN ERROR DURING ARGUMENT WHEN HE IN ESSENCE ARGUED FOR A DISCHARGE BASED ON THE NAVY'S POLICY TOWARD DRUG USE.

III. THE CONVENING AUTHORITY ERRED WHEN HE APPROVED THE DISCHARGE, BECAUSE PAGE 167 OF THE RECORD IS MISSING AND AS A RESULT THE RECORD IS NOT VERBATIM. (Citations omitted).

IV. THE JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS THE URINALYSIS RESULTS - APPELLANT'S URINE SAMPLE WAS ILLEGALLY SEIZED BECAUSE IT WAS NOT OBTAINED PURSUANT TO AN INSPECTION WITHIN THE MEANING OF MILITARY RULE OF EVIDENCE 313. (Footnote and citation omitted).

V. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THIS CASE BECAUSE ITS JUDGES, WHEN ACTING IN THEIR JUDICIAL CAPACITY, ARE PRINCIPAL OFFICERS, WHO HAVE NOT BEEN APPOINTED TO THEIR POSITIONS IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

VI. APPELLANT'S COURT-MARTIAL LACKS JURISDICTION BECAUSE THE MILITARY TRIAL JUDGE, ACTING IN HIS JUDICIAL CAPACITY, WAS A PRINCIPAL OFFICER WHO HAD NOT BEEN APPOINTED IN ACCORDANCE

oral argument by both Government and appellant's counsel. The findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Our reasoning is set out below.

During the appellant's trial we determined that the appellant "has not sustained his burden for expert assistance under *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994) and *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986)." Order denying Petition for Extraordinary Relief in the nature of a Writ of Prohibition and Mandamus, 15 August 1995. Despite our previous decision, the appellant asserts that we should give him a new trial because the military judge denied his request for expert assistance in the preparation of his defense.

The appellant's trial defense counsel requested "independent . . . expert assistance" before she interviewed the Government's expert. Appellate Exhibit IV; Record at 24. After interviewing and cross-examining the Government's expert, "it was incumbent on the defense to renew its request for independent expert assistance – if it was still deemed necessary." *United States v. Burnette*, 29 M.J. 473, 476 (C.M.A. 1990). *See also United States v. Ruth*, 46 M.J. 1, 4-5 (1997).

WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

VII. APPELLANT'S COURT-MARTIAL LACKS JURISDICTION BECAUSE THE CONVENING AUTHORITY, IN HIS CAPACITY AS A CONVENING AUTHORITY, WAS A PRINCIPLE OFFICER, WHO HAD NOT BEEN APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE. (Citations omitted.)

The appellant's trial defense counsel did not renew her request for independent expert assistance, and the appellant does not allege that the Government failed to disclose favorable evidence. *See United States v. Sebring*, 44 M.J. 805 (N.M.Ct.Crim.App. 1996). Instead, the record shows that the trial defense counsel effectively and extensively cross-examined the Government's expert. Record at 271-301; Defense Exhibits B-F. The appellant's trial defense counsel demonstrated "competence in defending [the] issue presented in [this] particular case." *United States v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994). The appellant's trial was fundamentally fair. Assignment of Error I provides no basis in law or fact for reexamining our previous decision.

The appellant's argument, in Assignment of Error II, that the trial counsel committed "reversible plain error during argument . . . based on the Navy's policy toward drug use" is without foundation in law or fact. *United States v. Kropf*, 39 M.J. 107, 109 (C.M.A. 1994).

The Government has corrected the administrative error in the record of trial identified in Assignment of Error III. Order granting Government Motion to Attach Documents, 19 Feb 1997. Page 167 was inadvertently omitted from the original record of trial. The missing page contained only a portion of the trial counsel's opening statement. We perceive no prejudice to the appellant, and none is alleged. Accordingly, we grant no relief. Art. 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a) (1994).

With regard to Assignment of Error IV, we cannot improve on the analysis provided to us in the Government's reply: "The military judge properly denied appellant's motion to suppress the urinalysis results because appellant's

sample was given pursuant to a 'command sweep[]' . . . . R[ecord at] 72-73, 79-80[;] . . . . *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991) . . . ."

Assignments of Error V-VII constitute a systemic attack on court-martial jurisdiction which has no merit. *See United States v. Grindstaff*, 45 M.J. 634, 635-36 (N.M.Ct.Crim.App. 1997).

Accordingly, the findings and sentence, as approved on review below, are affirmed.